



**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KENNETH C. McKNIGHT,

Plaintiff,

vs.

NORTHERN NEVADA CORRECTIONAL
CENTER, *et al*,

Defendants.

3:09-cv-00757-LRH-VPC

ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections, has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 (#1-2). The court has screened the complaint and finds that some of the counts must be dismissed.

I. Screening Pursuant to 28 U.S.C. § 1915A

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

1 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation
2 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of
3 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief
4 may be granted, or seeks monetary relief against a defendant who is immune from such relief." 28
5 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be
6 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same
7 standard under § 1915 when reviewing the adequacy of a complaint or an amended complaint.
8 When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
9 the complaint with directions as to curing its deficiencies, unless it is clear from the face of the
10 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70
11 F.3d 1103, 1106 (9th Cir. 1995).

12 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
13 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
14 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim
15 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In
16 making this determination, the Court takes as true all allegations of material fact stated in the
17 complaint, and the Court construes them in the light most favorable to the plaintiff. *See Warshaw v.*
18 *Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to less
19 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9
20 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). While the standard under Rule
21 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels
22 and conclusions. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic
23 recitation of the elements of a cause of action is insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S.
24 265, 286 (1986).

25 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
26 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal
27 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims
28 of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful

1 factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319,
 2 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

3 **II. Screening of the Complaint**

4 Plaintiff sues defendants Warden James Benedetti, Dr. Mar, Dr. Johns, and Nursing Director
 5 John Perry. Plaintiff seeks monetary damages as well as injunctive and declaratory relief.

6 **A. Defendants**

7 The Civil Rights Act under which this action was filed provides:

8 Every person who, under color of [state law] . . . subjects, or causes
 9 to be subjected, any citizen of the United States. . . to the deprivation
 10 of any rights, privileges, or immunities secured by the Constitution. . .
 shall be liable to the party injured in an action at law, suit in equity, or
 other proper proceeding for redress. 42 U.S.C. § 1983.

11 The statute plainly requires that there be an actual connection or link between the actions of the
 12 defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department*
 13 *of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit has
 14 held that “[a] person ‘subjects’ another to the deprivation of a constitutional right, within the
 15 meaning of section 1983, if he does an affirmative act, participates in another’s affirmative acts or
 16 omits to perform an act which he is legally required to do that causes the deprivation of which
 17 complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

18 Plaintiff has named the State of Nevada as a defendant in this action. The Eleventh
 19 Amendment prohibits federal courts from hearing suits brought against an unconsenting state.
 20 *Brooks v. Sulphur Springs Valley Elec. Co.*, 951 F.2d 1050, 1053 (9th Cir. 1991)(citation omitted);
 21 *see also Seminole Tribe of Fla. v. Florida*, 116 S.Ct. 1114, 1122 (1996); *Puerto Rico Aqueduct*
 22 *Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Austin v. State Indus. Ins. Sys.*, 939
 23 F.2d 676, 677 (9th Cir. 1991). Nevada explicitly has retained its full eleventh amendment immunity.
 24 Nev.Rev.Stat. 41.031(3). Accordingly, the court will dismiss the State of Nevada from this action.

25 **B. Count I**

26 Plaintiff claims that he suffers from an ongoing, active M.R.S.A. staph infection and has
 27 open wounds on his face, arms, neck, back, legs, and buttocks. Plaintiff claims that he has been
 28 denied treatment for his infection by Dr. Johns, Dr. Mar and John Perry.

1 A prisoner's claim of inadequate medical care does not constitute cruel and unusual
2 punishment unless the mistreatment rises to the level of "deliberate indifference to serious medical
3 needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The "deliberate indifference" standard involves
4 an objective and a subjective prong. First, the alleged deprivation must be, in objective terms,
5 "sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501
6 U.S. 294, 298 (1991)). Second, the prison official must act with a "sufficiently culpable state of
7 mind," which entails more than mere negligence, but less than conduct undertaken for the very
8 purpose of causing harm. *Farmer v. Brennan*, 511 U.S. at 837. A prison official does not act in a
9 deliberately indifferent manner unless the official "knows of and disregards an excessive risk to
10 inmate health or safety." *Id.*

11 In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's
12 civil rights have been abridged, "the indifference to his medical needs must be substantial. Mere
13 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." *Broughton*
14 *v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at 105-06. "[A]
15 complaint that a physician has been negligent in diagnosing or treating a medical condition does not
16 state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does
17 not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*,
18 429 U.S. at 106; see also *Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995);
19 *McGuckin v. Smith*, 974 F.2d 1050, 1050 (9th Cir. 1992), overruled on other grounds, *WMX Techs.,*
20 *Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to
21 establish deliberate indifference to serious medical needs. See *Wood v. Housewright*, 900 F.2d 1332,
22 1334 (9th Cir. 1990). A prisoner's mere disagreement with diagnosis or treatment does not support a
23 claim of deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

24 The court finds that count I states a colorable Eighth Amendment medical care claim against
25 the referenced defendants.

26 C. Count II

27 In count II plaintiff claims that he is suffering severely from hypo-glycemic diabetes. He
28 claims that he has been denied a glucometer for testing his blood sugar level, and has been denied

1 glucose for emergencies. He states that he has had such low levels that he lost consciousness and
2 fell to the floor. He states that his condition has affected his eyes, kidneys, and feet, and has caused
3 muscle cramps, shaking hands, and clogged arteries. He claims that he has been denied treatment by
4 Dr. Johns, Dr. Mar and John Perry. The court finds that count II states a colorable Eighth
5 Amendment medical care claim against the referenced defendants.

6 **D. Count III**

7 In count III, plaintiff claims that his Eighth Amendment rights have been violated because for
8 the first six months at Northern Nevada Correctional Center, he was provided only one set of
9 clothing. Plaintiff claims that he was told that he would not be receiving any replacement shoes and
10 that the laundry lost his new clothing and then refused to replace it.

11 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison
12 conditions must involve "the wanton and unnecessary infliction of pain." *Rhodes v. Chapman*, 452
13 U.S. 337, 347 (1981). Although prison conditions may be restrictive and harsh, prison officials must
14 provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. *Id.*;
15 *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986); *Hoptowit v. Ray*, 682 F.2d 1237, 1246
16 (9th Cir. 1982). Where a prisoner alleges injuries stemming from unsafe conditions of confinement,
17 prison officials may be held liable only if they acted with "deliberate indifference to a substantial risk
18 of serious harm." *Frost v. Agnos*, 152 F.3d 1124, (9th Cir. 1998) (citing *Farmer v. Brennan*, 511
19 U.S. 825, 835 (1994). The court finds as a matter of law that the injuries plaintiff alleges do not
20 present a substantial risk of serious harm. Thus, the court finds that count III fails to state a claim
21 upon which relief can be granted.

22 **E. Count IV**

23 In count IV, plaintiff alleges that he was physically assaulted by nurse Sue at a doctor's visit
24 on 6-16-08. Plaintiff also alleges that on the same date, he was subjected to nurse Sue's verbal
25 abuse.

26 When a prison official stands accused of using excessive physical force in violation of the
27 cruel and unusual punishment clause of the Eighth Amendment, the question turns on whether force
28 was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically for

1 the purpose of causing harm. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (citing *Whitley v. Albers*,
2 475 U.S. 312, 320-21 (1986)). In determining whether the use of force was wanton and unnecessary,
3 it is proper to consider factors such as the need for application of force, the relationship between the
4 need and the amount of force used, the threat reasonably perceived by the responsible officials, and
5 any efforts made to temper the severity of the forceful response. *Hudson*, 503 U.S. at 7. The extent
6 of a prisoner's injury is also a factor that may suggest whether the use of force could plausibly have
7 been thought necessary in a particular situation. *Id.* Although the absence of serious injury is
8 relevant to the Eighth Amendment inquiry, it is not determinative. *Id.* That is, use of excessive
9 physical force against a prisoner may constitute cruel and unusual punishment even though the
10 prisoner does not suffer serious injury. *Id.* at 9. Although an inmate need not have suffered serious
11 injury to bring an excessive force claim against a prison official, "[not] every malevolent touch by a
12 prison guard gives rise to a federal cause of action. *Hudson*, 503 U.S. at 9. "Not every push or
13 shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's
14 constitutional rights." *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.)(*cert. denied sub*
15 *nom. Johnson*, 414 U.S. 1033 (1973)). The Eighth Amendment's prohibition on cruel and unusual
16 punishments necessarily excludes from constitutional recognition *de minimus* uses of physical force.
17 *Id.* at 9-10. The court finds that plaintiff's bare allegation that nurse Sue physically assaulted him is
18 insufficient to state an Eighth Amendment excessive force claim. Mere verbal harassment or abuse
19 is not sufficient to state a constitutional deprivation under 42 U.S.C. § 1983. *Oltarzewski v.*
20 *Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987). Therefore, plaintiff's claim of verbal abuse is also
21 insufficient to state a claim. Count IV will therefore be dismissed for failure to state a claim upon
22 which relief can be granted.

23 **F. Count V**

24 In count V plaintiff alleges that on 6-23-08, C/O Brown attempted to intimidate him
25 and threatened to retaliate against him for pointing out nurse Sue's negligence. Verbal harassment is
26 insufficient to state a claim pursuant to 42 U.S.C. § 1983. Count V will therefore be dismissed for
27 failure to state a claim upon which relief can be granted.

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1 **G. Count VI**

2 In count VI, plaintiff alleges that Dr. Johns made light of his wounds and tried to
3 make nurse Sue's assault sound justified. He also alleges that Dr. Johns threatened him with
4 retaliation. Finally, he alleges that Dr. Johns denied and dismissed his request for soap. The court
5 finds that plaintiff's claim of verbal harassment is insufficient to state a 42 U.S.C. § 1983. The court
6 further finds that the bare allegation of a denial of a specific request for soap is insufficient to allege
7 that deliberate indifference to a substantial risk of serious harm necessary to support an Eighth
8 Amendment conditions of confinement case. Count VI fails to state a claim upon which relief can
9 be granted.

10 **H. Count VII**

11 In count VII, plaintiff alleges that he was verbally abused by John Perry at his visit with Dr.
12 Johns. Plaintiff's claim of verbal harassment is insufficient to state a 42 U.S.C. § 1983 claim, and
13 count VII fails to state a claim upon which relief can be granted.

14 **I. Count VIII**

15 In count VIII, plaintiff alleges that on 7-3-08 he was denied band-aids and antibiotic ointment
16 to clean and cover his "wounds," as well as his daily medication, Dr. Scott's prescription, and his
17 "proper diet." The court finds as a matter of law that plaintiff's allegations cannot support a finding
18 of deliberate indifference to serious medical needs. Accordingly, the court finds that count VIII fails
19 to state a claim upon which relief can be granted.

20 **J. Count IX**

21 In count IX plaintiff alleges that since entering the NDOC, he has been charged \$8.00 every
22 time he is required to see the doctor or dentist, or to receive medical treatment. There is no
23 constitutional right to free medical care for incarcerated persons. Count IX fails to state a claim
24 upon which relief can be granted.

25 **K. Count X**

26 In count X, plaintiff alleges that on July 17, 2008, he passed out and fell to the ground, and
27 no help was offered by prison employees who were watching. Plaintiff does not allege injury or lack
28 of medical care. Count X fails to state a claim upon which relief can be granted.

1 **L. Count XI**

2 In count XI, plaintiff alleges that he regularly is denied soap to clean his body and his one set
3 of clothes for long periods of time, citing as an example one four day period. The court finds that
4 plaintiff's allegations are insufficient to establish deliberate indifference to a substantial risk of
5 serious harm. Count XI thus fails to state a claim upon which relief can be granted.

6 **M. Count XII**

7 In count XII, plaintiff alleges that he was taken from his unit and locked away after refusing
8 to take a T.B. test. Plaintiff claims that although he had already undergone treatment for T.B. and
9 had been warned never to take the test or medication again and had paperwork to prove this, he was
10 forced to take the test and the medication. Plaintiff does not allege any injury. A prisoner's mere
11 disagreement with diagnosis or treatment does not support a claim of deliberate indifference to
12 support an Eighth Amendment claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).
13 Accordingly, the court finds that count XII fails to state a claim upon which relief can be granted.

14 **N. Count XIII**

15 In count XIII, plaintiff alleges verbal abuse related to having a staff infection. Plaintiff's
16 claim of verbal harassment is insufficient to state a 42 U.S.C. § 1983. To the extent that plaintiff
17 alleges a lack of medical care, this claim is duplicative of count I. Count XIII will be dismissed on
18 that basis.

19 **O. Count XIV**

20 In count XIV, plaintiff alleges that he suffers every day as a result of unsanitary conditions
21 and lack of medical treatment. This count is duplicative of counts I and II, and will be dismissed on
22 that basis.

23 **P. Count XV**

24 In count XV, plaintiff alleges that Dr. Gedney has altered his diet without conducting an
25 examination of his condition. Plaintiff alleges that this has negatively affected his diabetes, and was
26 done as a direct act of retaliation and a deliberate threat to his life and limbs. The court finds that
27 these allegations amount to a claim of deliberate indifference to a substantial risk of serious harm.
28 Thus, the court finds that count XV states a colorable Eighth Amendment claim based on conditions

1 of confinement.

2 **Q. Count XVI**

3 In count XVI, plaintiff alleges that on 1-20-09 he went to the RMF seeking help for
4 symptoms of high blood sugar and was told that he had to wait for a while. Plaintiff then left. These
5 factual allegations do not state an Eighth Amendment medical care claim. Plaintiff also alleges that
6 he was issued "tainted poison" toothpaste while he was at Lovelock. He claims that after some
7 months use, it was recalled. Plaintiff does not allege deliberate indifference by any defendant or the
8 existence of a substantial risk of serious harm. The court finds that count XVI fails to state a claim
9 upon which relief can be granted.

10
11 **IT IS THEREFORE ORDERED** the Clerk of the Court shall **FILE** the complaint. (Docket
12 #1-1.)

13 **IT IS FURTHER ORDERED** that defendant the State of Nevada is **DISMISSED** from this
14 action with prejudice.

15 **IT IS FURTHER ORDERED** that counts III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XVI
16 are **DISMISSED** for failure to state a claim.

17 **IT IS FURTHER ORDERED** that counts XIII and XIV are **DISMISSED** as duplicative.

18 **IT IS FURTHER ORDERED** that this action shall go forward on counts I, II and XV only.

19 **IT IS FURTHER ORDERED** that plaintiff's motion for assignment of service (docket #8)
20 and motion for case copy (docket #9) are **DENIED** as moot.

21 **IT IS FURTHER ORDERED** as follows:

22 1. The Clerk shall electronically serve a copy of this order, including the attached Notice
23 of Intent to Proceed with Mediation form, along with a copy of plaintiff's complaint (docket
24 #1-1) on the Office of the Attorney General of the State of Nevada, to the attention of Pamela
25 Sharp.

26 2. The Attorney General's Office shall advise the Court within **twenty-one (21) days** of the
27 date of entry of this order whether it can accept service of process for the named defendants. As to
28 any of the named defendants for which the Attorney General's Office cannot accept service, the

1 Office shall file, *under seal*, the last known address(es) of those defendant(s).

2 3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a
3 motion identifying the unserved defendant(s), requesting issuance of a summons, and specifying a
4 full name and address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the
5 Federal Rules of Civil Procedure, service must be accomplished within one hundred twenty (120)
6 days of the date the complaint was filed.

7 4. If the Attorney General accepts service of process for any named defendant(s), such
8 defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days**
9 following the date of the early inmate mediation. If the court declines to mediate this case, an
10 answer or other response shall be due within **thirty (30) days** following the order declining
11 mediation.

12 5. The parties **SHALL DETACH, COMPLETE, AND FILE** the attached Notice of Intent
13 to Proceed with Mediation form on or before **thirty (30) days** from the date of entry of this order.

14 **IT IS FURTHER ORDERED** that henceforth, Plaintiff shall serve upon defendants or, if an
15 appearance has been entered by counsel, upon their attorney(s), a copy of every pleading, motion or
16 other document submitted for consideration by the court. Plaintiff shall include with the original
17 paper submitted for filing a certificate stating the date that a true and correct copy of the document
18 was mailed to the defendants or counsel for defendants. If counsel has entered a notice of
19 appearance, the plaintiff shall direct service to the individual attorney named in the notice of
20 appearance, at the address stated therein. The Court may disregard any paper received by a district
21 judge or magistrate judge which has not been filed with the Clerk, and any paper received by a
22 district judge, magistrate judge or the Clerk which fails to include a certificate showing proper
23 service.

24 DATED this 27 day of October, 2010.

25
26 

27 LARRY R. HICKS
28 UNITED STATES DISTRICT JUDGE

Name _____

Prison Number (if applicable) _____

Address _____

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

_____,)
Plaintiff,)
v.)
_____)
_____)
Defendants.)

Case No. _____

**NOTICE OF INTENT TO
PROCEED WITH MEDIATION**

This case may be referred to the District of Nevada's early inmate mediation program. The purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by which the parties meet with an impartial court-appointed mediator in an effort to bring about an expedient resolution that is satisfactory to all parties.

1. Do you wish to proceed to early mediation in this case? ____ Yes ____ No
2. If no, please state the reason(s) you do not wish to proceed with mediation? _____

3. List any and all cases, including the case number, that plaintiff has filed in federal or state court in the last five years and the nature of each case. (Attach additional pages if needed).

4. List any and all cases, including the case number, that are currently pending or any pending grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

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5. Are there any other comments you would like to express to the court about whether this case is suitable for mediation. You may include a brief statement as to why you believe this case is suitable for mediation. (Attach additional pages if needed).

This form shall be filed with the Clerk of the Court on or before twenty (20) days from the date of entry of this order.

Counsel for defendants: By signing this form you are certifying to the court that you have consulted with a representative of the Nevada Department of Corrections concerning participation in mediation.

Dated this ____ day of _____, 2010.

Signature

Name of person who prepared or
helped prepare this document